RONNY ABDULLAH

v.

PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NOS: S-05-30-2006 & S-05-31-2006]
26 JULY 2011

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Common intention - Whether proved - Circumstantial evidence - Whether cumulative effect of events led to infer and conclude one of the appellants slashed neck of deceased - Mental element of appellants - Whether trial judge correctly applied four limbs of s. 300 of the Penal Code - Prima facie case - Whether established*

The appellants were charged with common intention to commit murder by causing the death of Amanra Bte Jakaria ("the deceased"). Two couples, PW6 with PW3 and PW7 with the deceased, were attacked suddenly by the first appellant wielding a parang assisted by the second appellant at around 6.30pm on 26 March 2001 at Sandakan Park. The first appellant caught and dragged the deceased away from the scene. PW7 could not assist the deceased as the second appellant came after him. Later the body of the deceased was found with two neck wounds, a bite mark on her cheek, contusion marks on the right shoulder and abrasion at the vaginal introitus. A DNA test carried out with the vaginal swabs of the deceased matched the blood sample from the first appellant. Analysis of the deceased's pubic hair revealed that the specimen hair matched sample of pubic hairs taken from the body of the first appellant. The police recovered a shirt near the deceased's body, identified by PW3, PW6 and PW7 as the shirt worn by the first appellant when they were attacked by him. PW3, PW6 and PW7 also identified the skirt worn by the deceased which was recovered by the police near the deceased's body. The prosecution relying on circumstantial evidence and evidence from credible witnesses *inter alia*, PW3, PW6 and PW7, survivors of the attack, had established a *prima facie* case against both the appellants for the murder of the deceased. The learned trial judge convicted both the appellants and sentenced them. The appellants' appeal against their conviction and sentences were

A heard together. The appellants argued that the learned trial judge had erred in making a finding that (i) there was common intention to commit murder by the appellants; (ii) the learned trial judge did not give due consideration that PW3, PW6 and PW7 may have mistook the second appellant being one of the attackers due to
B poor visibility.

Held (dismissing the appeals)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

C **(1)** On the basis of the overwhelming evidence adduced by the prosecution and considering that the material witnesses and the Police had been subjected to rigorous cross-examination by the two defence counsel, and had remained consistent in their testimonies, learned High Court judge was correct with regard
D to the findings against the two appellants. Hence, there was no reason to interfere with the findings of the learned High Court judge. Further, as this was a case where the prosecution was relying on circumstantial evidence, the learned trial judge had correctly applied the general principles as
E adopted in *Eng Sin v. PP*. (paras 29 & 30)

(2) With reference to s. 34 of the Penal Code, the trial judge had made the correct assessment in finding the cumulative effect of the events of unbroken chain of circumstantial evidence had
F led to infer and conclude that either the first appellant or the second appellant slashed the neck of the deceased which resulted in her death and that the slashing was in furtherance of a common intention to commit murder. (para 33)

G **(3)** According to the medical evidence, there were serious injuries to the neck of the deceased and the learned trial judge had correctly made his finding that there was an intention on the part of the appellants to cause the death of the deceased. The learned trial judge had correctly applied the four limbs of
H s. 300 of the Penal Code to infer that there was the intention to kill the deceased. Based on the evidence and the nature of the injuries, there was no disagreement with the learned trial judge on the issue of the mental element of the two appellants. (paras 36 & 37)

I **(4)** As to the second appellant's submission of mistaken identity, the learned trial judge had had the opportunity of seeing the demeanour of all the material witnesses concerned and of

assessing their credibility. It was submitted that PW3, PW6 and PW7 had seen him in close proximity at the scene of the attack and he had been correctly identified at the identification parade as the other person who had attacked them. The finding of the learned trial judge did not go against the weight of the evidence. (paras 51 & 52)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu dituduh dengan melanjutkan niat bersama untuk melakukan pembunuhan dengan menyebabkan kematian Amanra Bte Jakaria ('simati'). Dua pasangan, PW6 dengan PW3, dan PW7 dengan simati, secara tiba-tiba telah diserang oleh perayu pertama yang menggunakan sebilah parang dibantu oleh perayu kedua pada pukul 6.30 petang pada 26 Mac 2001 di Sandakan Park. Perayu pertama telah menangkap dan mengheret simati dari tempat itu. PW7 tidak dapat menyelamatkan simati kerana perayu kedua telah menuju ke arahnya. Kemudiannya, mayat simati dijumpai dengan dua luka di bahagian leher, tanda gigitan di pipi, luka-luka memar pada bahu kanan dan lelasan di introitus faraj. Ujian DNA telah dijalankan dengan swab faraj simati dan didapati adalah sepadan dengan sampel darah dari perayu pertama. Analisis bulu kemaluan simati menunjukkan rambut spesimen padan dengan sampel bulu kemaluan yang diambil dari badan perayu pertama. Polis menjumpai baju kemeja berdekatan dengan mayat simati, yang dikenalpasti oleh PW3, PW6 dan PW7 sebagai baju kemeja yang dipakai oleh perayu pertama apabila perayu pertama sedang menyerang mereka. PW3, PW6 dan PW7 juga mengenalpasti sehelai skirt yang dipakai oleh simati yang telah dijumpai oleh polis berdekatan dengan mayat simati. Pihak pendakwaan bergantung pada keterangan mengikut keadaan dan keterangan dari saksi-saksi boleh dipercayai antara lain PW3, PW6 dan PW7, yang telah terselamat dari serangan, telah membuktikan kes *prima facie* terhadap kedua-dua perayu bagi pembunuhan simati. Yang arif hakim bicara telah menyabitkan kedua-dua perayu dan menjatuhkan hukuman. Rayuan perayu-perayu terhadap sabitan dan hukuman didengar bersama-sama. Perayu-perayu berhujah bahawa yang arif hakim bicara telah khilaf dalam mendapati bahawa (i) terdapatnya niat bersama perayu-perayu untuk melakukan pembunuhan dan (ii) yang arif hakim bicara tidak memberi pertimbangan yang sewajarnya bahawa PW3, PW6 dan PW7 mungkin telah salah anggap perayu kedua sebagai salah satu penyerang disebabkan jarak penglihatan yang tidak berapa jelas.

Diputuskan (menolak rayuan-rayuan)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan bukti yang kukuh yang dikemukakan oleh pihak pendakwaan dan mempertimbangkan saksi-saksi penting dan pihak polis telah disoal balas dengan ketat oleh dua peguam pembela, dan telah kekal dan konsisten di dalam keterangan mereka, yang arif hakim bicara betul dengan dapatan-dapatan mereka terhadap kedua-dua perayu. Oleh itu, tiada sebab untuk mengganggu dengan dapatan-dapatan yang arif Hakim Mahkamah Tinggi. Seterusnya, oleh kerana ini adalah kes di mana pendakwaan bergantung pada keterangan ikut keadaan, yang arif hakim bicara telah menggunakan dengan betul prinsip-prinsip am seperti yang dipakai di dalam *Eng Sin v. PP*.

(2) Dengan merujuk kepada s. 34 Kanun Keseksaan, yang arif hakim telah membuat penilaian yang betul dalam mendapati kesan kumulatif peristiwa-peristiwa rantaian keterangan mengikut keadaan yang tak putus-putus telah membawa kepada kesimpulan bahawa sama ada perayu pertama atau perayu kedua yang telah tetak leher si mati yang mengakibatkan kematiannya dan tetakan itu adalah sebagai lanjutan mencapai niat bersama untuk melakukan pembunuhan.

(3) Menurut keterangan perubatan, terdapat kecederaan-kecederaan serius pada leher simati dan yang arif hakim bicara telah dengan betul membuat dapatan bahawa terdapat niat dari pihak perayu-perayu untuk menyebabkan kematian simati. Yang arif hakim bicara telah dengan betul menggunakan keempat-empat cabang s. 300 Kanun Keseksaan untuk menyimpulkan bahawa terdapat niat untuk membunuh simati. Berdasarkan keterangan dan jenis-jenis kecederaan, tiada perselisihan pendapat dengan yang arif hakim bicara atas isu elemen mental kedua-kedua perayu.

(4) Mengenai hujahan perayu kedua mengenai kesilapan identiti, yang arif hakim bicara mempunyai peluang untuk melihat sikap saksi-saksi penting berkenaan dan menilai kredibiliti mereka. Ia telah dihujahkan bahawa PW3, PW6 dan PW7 telah melihat perayu kedua dalam jarak yang dekat di tempat kejadian serangan itu dan perayu kedua telah dengan betul dikenalpasti di perbarisan pengecaman sebagai orang yang lagi satu yang telah menyerang mereka. Dapatan yang arif hakim bicara tidak menentang keterangan.

Case(s) referred to:
Eng Sin v. PP [1974] 1 LNS 33 FC ***(refd)***
Martin v. Osborne [1936] 55 CLR 367 ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Rex v. Vincent Banka & Anor [1936] 1 LNS 62 PC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 113
Penal Code, ss. 34, 300

For the appellants (both appeals) - Ram Singh; M/s Ram Singh Harbans & Co
For the respondent (both appeals) - Mohd Abazafree Mohd Abas DPP; AG's Chambers

[Appeal from High Court, Sandakan; Criminal Trial No: S(47)-01-2002]

Reported by Anesa Karisma

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] The appellants appeal to this court against their conviction and sentence for the murder of an eighteen year old girl, one Amanra bte Jakaria.

[2] Before the High Court the first appellant (Ronny) was the first accused, whilst the second appellant (Paul) was the second accused. After their conviction and sentence, each of them filed a separate appeal to this court (Court of Appeal), namely, Criminal Appeal No. S-05-30-2006 and Criminal Appeal No. S-05-31-2006. Before us these two appeals are heard together.

[3] Murder is a capital offence: upon conviction there is only one punishment prescribed by the Penal Code - the death penalty.

[4] We had unanimously dismissed these two appeals. We find no justification to disturb the findings on the facts and the law by the learned trial court judge.

[5] We shall now give our grounds for so holding.

[6] We begin by reminding ourselves that as an appellate court we should be slow in interfering with the decision of the trial court which had observed the demeanour and heard the witnesses

before coming to its conclusion. Needless to say, this principle is basic and elementary and we do not propose to cite any authority.

[7] Bearing this basic principle in mind, we shall now examine the facts of the case - the facts of the case as found by the learned High Court judge based on the totality of the evidence adduced before him.

The Facts And The Evidence

[8] On 26 March 2001, in the evening, two couples were sitting under a hut at Sandakan Park in Sandakan. They were seated on two benches, a couple to a bench. The benches were on each side of the hut. The two couples were suddenly attacked and violently assaulted by two men, one of whom wielded a parang. Of the two couples, three persons managed to escape. One did not. She was last seen dragged by one of the two attackers, that is, the one who had a parang in his hand. The last that was heard from her were her cries for help as she was dragged away. Her naked and lifeless body was later discovered that very night. There were visible wounds to her cheek and neck. The subsequent post mortem revealed that there was semen in her vagina suggesting that she had been sexually assaulted. This victim of this tragic incident was 18 year old Amanra bte Jakaria.

[9] The charge against the first and second appellants states:

> That you on 26th March 2001 at around 6.30pm at Sandakan Park, Mile 7, Labuk Road, in the District of Sandakan, in the State of Sabah, in furtherance of a common intention between you both, did commit murder by causing the death of one Amanra bte Jakaria, 18 years old female by slashing her neck with a parang and that you have thereby committed an offence punishable under Section 302 of the Penal Code.

[10] The prosecution called 30 witnesses.

[11] The prosecution's case relied on circumstantial evidence.

[12] The three survivors of the attack at Sandakan Park were called as witnesses for the prosecution. They are:

(a) Norliah Sungsang (PW3);

(b) Norazmi bin Yunus (PW6); and

(c) Azman Abd Hamid (PW7).

[13] Norliah (PW3) and Norazmi (PW6) were the couple who sat on the bench opposite to the bench occupied by Azman (PW7) and the deceased, the other couple on that fateful evening. Azman (PW7) had known the deceased, who was his girlfriend, for two years prior to the incident. On the day in question (26 March 2001) while he and the deceased were sitting on one bench facing the backs of Norliah (PW3) and Norazmi (PW6), who were sitting on the other bench, the first accused (who, after this, shall be referred to as 'Ronny') suddenly attacked him with a parang (exh. P15). Just before the attack, he saw the first accused calling out to the second accused (who, after this, shall be referred to as 'Paul') in a foreign language which he took to be a signal for the second accused to attack. Paul came from another direction and managed to get hold of Norliah (PW3). Azman (PW7) managed to avoid the parang (exh. P15) which Ronny swung at him. Azman (PW7) ran but returned to try to rescue the deceased who was crying for help. Ronny was dragging her, holding her around the neck with one hand while his other hand was holding the parang (exh. P15). Azman (PW7) fled a second time when he saw Paul going for him.

[14] Azman (PW7) said in evidence that, although it was already after sunset that the attacks took place, he could, nevertheless, still see the features of the two attackers, and he described them. He said that the person who attacked him with the parang (exh. P15) was wearing a batik shirt, and he identified Ronny as being the person. The other attacker, according to Azman (PW7), was wearing a white shirt, and he identified Paul as the second attacker.

[15] The evidence of Norazmi (PW6) was consistent with that of Azman (PW7). Norazmi (PW6) also identified Ronny as the person who attacked Azman (PW7) and the deceased with a parang (exh. 15); and he also identified Paul as the person who Ronny called out to just before the attack. He said that Paul was wearing a white shirt. Norazmi (PW6) said that he saw both Ronny and Paul and although it was already sunset their features were clearly recognizable. He identified the deceased, Amanra, and said that as he was fleeing he heard Amanra crying for help. He also said that he saw Ronny smoking a cigarette and watching them (the two couples) minutes before the attack.

[16] Norliah (PW3) said in evidence that Ronny was smoking a cigarette before he called out to Paul just before attacking Azman (PW7) and the deceased with the parang. She said Ronny was

A wearing a batik shirt whilst Paul was wearing a white shirt. According to Norliah (PW3) Paul grabbed her hand but she managed to break free and fled. She too heard Amanra crying for help. She also saw the features of Ronny and Paul clearly because it was not so dark then.

B

[17] The learned trial judge found Norliah (PW3), Norazmi (PW6) and Azman (PW7) to be credible witnesses. Based on our evaluation of the evidence, we have no reason to disagree with him.

C **[18]** ASP Dennis Leong (PW27) received information relating to the incident at Sandakan Park at 9.15pm on the day of the incident. He led a team of police personnel to Sandakan Park and to search the area.

D **[19]** At the edge of a jungle ASP Dennis (PW27) saw reddish spots on leaves which appeared to be blood. He and his team followed the trail. Eventually, he and his team came across a hut in a banana garden. He and his team discovered a dead body lying on its back on planks inside the hut. ASP Dennis (PW27) saw E wounds on the neck, fingers and hand including what appeared to be a bite mark. The body was taken from the hut to a waiting police vehicle at Sandakan Park. There, Azman (PW7) identified the dead body as that of the deceased,, Amanra bte Jakaria.

F **[20]** Amanra's body was taken to the Sandakan Hospital. A post mortem was conducted on the following day (27 March 2001) at about 10.50am by Dr Thialagawatya (PW2). According to Dr Thialagawatya (PW2) there were two neck wounds on the deceased: one was on the left side of the neck just below the G mandible exposing the muscle, a 5-inch clean cut wound; the other was a 4-inch chopped clean cut wound to the right of the back of the neck which cut into the cervical vetebra at C3 level with the cervical cut through up to the trachea. Dr Thialagawatya (PW2) also found a bite mark on the right cheek of the deceased. H There was a contusion mark on the right shoulder. There was an abrasion at the vaginal introitus. The cause of death was resection of the cervical cord at C3 level. She said the wounds could be caused by a sharp object, for example, a large knife. She tendered to Court her post mortem report (exh. P41).

I

[21] Dr Thialagawatya (PW2) took vaginal swabs from the deceased which were sent for DNA analysis. The DNA analysis was carried out by Dr Seah Lay Hong (PW4) whose report was produced and admitted as prosecution exh. P47. The blood sample of the first accused was also sent to Dr. Seah (PW4) for DNA analysis. The result stated in the DNA report (exh. P47) was as follows:

> The DNA typing results indicate that the male profile derived from the vaginal swabs "X" matches the profile obtained from blood specimen "EX33" (labeled "Ronny b. Abdullah"). The probability of a coincidental match from a randomly selected, unrelated individual is 1 in 5.2 billion based on the population database of Malaysia Malays.

[22] The pubic hair specimen obtained by Dr Thialagawatya (PW2) during the post mortem by combing the pubic hair of the deceased was sent for analysis. Encik Ahmad Rizuan Ibrahim (PW1), Director of the Chemistry Department, Kota Kinabalu, carried out an analysis on the pubic hair specimen. His analysis revealed that the three strands of pubic hair specimen taken from the deceased matched the sample of pubic hairs taken from the body of Ronny.

[23] The prosecution also led evidence on various items recovered in the course of police investigation. ASP Dennis (PW27) testified that he recovered a pair of shirt (exh. P19) soaked in a plastic pail at the place where the deceased's body was discovered. Norliah (PW3), Norazmi (PW6) and Azman (PW7) identified the shirt (exh. P19) as being similar to that worn by Ronny when they were being attacked by Ronny and Paul. Other items recovered by ASP Dennis (PW27) were a pair of wooden sandals (exh. P23); the left side was recovered near the blood trail and the other side was found at the hut where the deceased was found. This pair of wooden sandals (exh. P23) was identified by Epah bte Esong (PW13), the mother of the deceased, as the sandals worn by the deceased. A skirt (exh. P21) recovered by ASP Dennis (PW27) at the hut was also identified by Norliah (PW3), Norazmi (PW6) and Azman (PW7) as being the one worn by the deceased at the time of the incident.

[24] Ronny was arrested at about 9pm on 8 April 2001 by ASP Dennis (PW27) at the Sandakan police station.

[25] Paul was arrested by ASP Dennis (PW27) on the same day at about 11.30pm at an unnumbered house in Kampung BDC. It was Ronny who led ASP Dennis (PW27) to that house.

[26] Exhibit P15, the weapon used in the killing of the deceased, was recovered from a house at Taman Khong Lok, Sandakan, as a result of information given by Ronny to ASP Dennis (PW27). Ronny had made a s. 113 (of the Criminal Procedure Code) cautioned statement to ASP Dennis (PW27) stating that exh. P15 was the weapon used to kill Amanra. The latter led a police team to recover it from the house mentioned by Ronny in his cautioned statement. Further, exh. P15 was identified by Norliah (PW3) and Norazmi (PW6) as the parang used by Ronny during the attack. Azman (PW7), however, testified that it was similar to the one wielded by Ronny.

[27] Chief Inspector Majari (PW20) testified that Ronny led a police team to a banana garden at Mile 7, Sandakan, where a white body-fit shirt (exh. P34) was recovered. This white shirt (exh. P34) was identified by Azman (PW7) and the deceased's mother, Epah bte Esong (PW13), as the shirt worn by Amanra on the day she was killed.

The Findings Of The Learned Trial Judge

[28] At the close of the case for the prosecution, and after hearing the submissions of the parties, the learned trial judge made the following findings:

> That was the case for the prosecution and on that basis it was submitted by the learned DPP that the prosecution had established its case against the 1st and 2nd accused as charged. Learned Counsel for the 1st accused contended that the prosecution had failed to adduce sufficient evidence to establish that it was the 1st accused who had committed the *actus reus* of the offence charged, alternatively, it was argued that the injuries sustained by the deceased did not "reflect the intention to kill". For the 2nd accused, it was argued by Learned Counsel that the prosecution had failed to establish the essential element of common intention and that the 2nd accused was mistakenly identified as the other person who, together with the 1st accused, attacked PW3, PW6, PW7 and the deceased on the evening of 26.3.2001.
>
> It was incontrovertibly proved by the prosecution that the deceased, Amanra bt. Jakaria, was found dead on the night of 26.3.2001 and so was the fact that her death was caused by the wound at the back of her neck. In order to establish the other

> elements of the offence for which the 1st and 2nd accused were charged - that in furtherance of a common intention the 1st and 2nd accused did commit murder by causing the death of the deceased by slashing her with a parang, the prosecution relied entirely on circumstantial evidence. The principles to be applied can be found in some of the authorities cited both by the prosecution and the defence, but first, it must be said, at the risk of stating the obvious, that the evidence led by the prosecution was credible and reliable.

[29] With respect, on basis of the overwhelming evidence adduced by the prosecution, and considering that the material witnesses such as Norliah (PW3), Norazmi (PW6), Azman (PW7) and ASP Dennis (PW27) been subjected to rigorous cross-examination by the two defence counsel, and had remained consistent in their testimonies, we are with the learned High Court judge with regard to the above findings. We see no reason to interfere with the findings.

[30] As this is a case where the prosecution is relying on circumstantial evidence, the learned trial judge, in our view, had correctly applied the general principles as enunciated in *Martin v. Osborne* [1936] 55 CLR 367 at p. 375 and adopted by our Federal Court in *Eng Sin v. PP* [1974] 1 LNS 33; [1974] 2 MLJ 168 at p. 168. Gill CJ in delivering the judgment of the Federal Court in Eng Sin quoted the following passage from *Martin v. Osborne*:

> If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued.

Common Intention

[31] The learned counsel for the appellants, Encik Ram Singh, submits before us that the learned trial judge had erred in making a finding that there was common intention on the part of Ronny and Paul to cause the death of Amanra. The reasons given by

learned counsel are that, firstly, there was no evidence that Paul had attacked and assaulted either the deceased or any of her three friends. The only evidence against Paul is that he had grabbed the hand of Norliah (PW3) who was then able to set herself free. Secondly, it is submitted by learned counsel, there is no evidence of any discussion or conversation between Ronny and Paul prior to attacking the deceased and her three friends.

[32] We find no merits in this argument.

[33] On the issue of common intention, we find, bearing in mind s. 34 of the Penal Code, that the learned trial judge had correctly made the following finding:

> I was satisfied that the cumulative effect of these series of unbroken chain of circumstantial evidence led to the irresistible inference and conclusion that either the 1st or the 2nd accused slashed the neck of the deceased which resulted in her death and that the slashing was in furtherance of a common intention to commit murder by causing the death of the deceased Amanra bte Jakaria.

[34] In *Namasiyiam Doraisamy v. Public Prosecutor & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241, an authority referred to by the learned trial judge, Syed Agil Barakbah SCJ, in delivering the judgment of the Supreme Court, said (at p. 252):

> Where the prosecution case rests on circumstantial evidence, the circumstances which are approved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (The Supreme Court (of India) on Criminal Law 1950-1960 by JK Soonavala page 188 to 193).

[35] Huggard CJ, in *Rex v. Vincent Banka & Anor* [1936] 1 LNS 62; [1936] MLJ 53 at p. 56 cited with approval a passage from the judgments of the Full Bench in the case of *The Emperor v. Nga Aung Thien* reported in the All India Reporter (Rangoon) for March 1935:

> The following extracts from the judgments of the Full Bench may usefully be quoted. At page 90 of the report Page C.J. says:

> Whether or not a criminal act is done by several persons in furtherance of the common intention of all, is a question of fact to be determined on a consideration of the facts in each case, and the common intention may be inferred from the circumstances disclosed in the evidence, and need not be the subject of an express agreement between the persons concerned.

The Intention To Cause Death

[36] It is to be recalled that according to the medical evidence of the doctor there were serious injuries inflicted to the neck of the deceased. The learned trial judge, in his grounds of judgment, made a finding that there was an intention on the part of appellants to cause the death of the deceased. The learned trial judge, after alluding to the four limbs of s. 300 of the Penal Code, made the following finding:

> The two clean-cut wounds on the neck of the deceased were inflicted on a very vulnerable part of the human anatomy. They were gruesome: one exposed the muscle while the other cut through the cervical up to the trachea, which was the cause of death. The irresistible inference was the intention to kill the deceased.

[37] With respect, based on the evidence, in particular, the nature of the injuries, we see no reason to disagree with the learned trial judge on the issue of the mental element of the two appellants. The learned trial judge obviously had in mind limb (a) of s. 300 (inflicting the injuries with the intention of causing the death of the deceased).

Prima Facie Case

[38] At the close of the case for the prosecution, the learned trial judge came to the following conclusion:

> Applying the test, standard and procedure set out in *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85 to the whole evidence adduced by the prosecution, I was satisfied that the prosecution had made out a *prima facie* case and accordingly called upon the 1st and the 2nd accused to enter their defence.

[39] On the basis of what we have said earlier, we agree with the above conclusion.

A

The Defence

[40] Ronny elected to give evidence on oath. He had his education in Tawi-Tawi, Philippines, and came to Sabah 21 years ago and had not been back to the Philippines ever since he was
B 11 years old. On 26 March 2001 he was at the foot of the hill at Rimba Park, Sandakan working overtime as a construction worker until 7pm in the evening.

[41] He further testified that after that he went to Rimba Park
C because he had, earlier, seen the deceased being with Azman (PW7). He said that he was accompanied by a co-worker, Taha, whom he called Wahid. It is his evidence that the deceased, Amanra, was his lover, and that he had known her since 1995. He saw both Azman (PW7) and the deceased at the recreational
D hut. He said he saw Azman (PW7) 'on top' of the deceased and was fondling her. He also saw Norliah (PW3) and Norazmi (PW6) at the hut. When he (Ronny) saw what the deceased and Azman (PW7) were doing he was deeply incensed. But he said his anger was not towards the deceased; it was towards Azman (PW7) who
E was disturbing his lover, Amanra, the deceased. He then took out a samurai sword that he had brought along with him to attack Azman (PW7). While Azman (PW7) was still on top of the deceased, he struck Azman (PW7) twice with the samurai sword but missed because Azman (PW7) managed to avoid from being
F struck; instead, it was Amanra who got struck on the neck by one of the strikes. While he was attacking Azman (PW7), Wahid grabbed Norliah (PW3). After Norliah (PW3) and Azman (PW7) ran away, Wahid too ran away, leaving him alone with the deceased in the hut. According to Ronny, Amanra was still alive
G then but unable to speak. He then removed the deceased's clothing and bathed the deceased with water from a source nearby because he wanted to clean the blood from her body. After giving the deceased a bath, and while she was still alive, he had sexual intercourse with her because he was mad with Azman (PW7). He
H admitted to biting the deceased's cheek for the same reason. He then took the deceased to the hut at the banana garden, and laid her there. He left after she was dead.

[42] Ronny said in evidence that he sent the samurai sword to Taganak Island through his cousin. He said that at the time of the
I attack it was not so dark, and that there was a little bit of light.

He said he led the police to Paul's house at Kampung BDC where Paul was arrested. Paul was his brother-in-law. He led the police to his auntie's house at Taman Khong Lok, Sandakan, where the parang (exh. P15) was recovered.

[43] Ronny called one Salmah Ugah (DW2) as his witness. Salmah (DW2) said that a police team came to her house at Taman Khong Lok on 9 April 2001 at about noon. They brought along Ronny with them. At her house Ronny showed ASP Dennis (PW27) a parang that she had kept in the kitchen, a parang that Ronny used whenever he did work for her. She handed the parang to ASP Dennis (PW27). She said that the parang which the police seized from her house looked similar to exh. P15. She (DW2) said that she was not related to Ronny but she had known him since 1991 or 1992 when she was renovating her kitchen and Ronny worked on the renovation. After the renovation was completed, Ronny would still sometimes come to her house to ask for work, and if she were to tell him that there was none, he would still insist on being given some work. Sometimes, out of pity, she would ask Ronny to cut the grass, and would then give him something to eat and drink, and some money as well. Her impression of Ronny was that of an obedient and hardworking person, although he might appear to be stupid at times.

[44] Paul, the second appellant, also gave evidence on oath. His defence was that of an alibi. He said he was 37 years old and resided at Jambatan C Kampung BDC Sandakan where he was arrested on Sunday, 8 April 2001 at around 11.30pm. Ronny was his brother-in-law, his wife's younger brother. He said that on 26 March 2001 between 4.30pm and 6.30pm he was at Batu Putih, Mile 7, Kampung Alayan, building a house for one Haji Aras. He started building the house on 1 March 2001 and worked six days a week from Monday to Saturday from 7am to 6.30pm with a one-hour break from 12.00 noon to 1pm. He stayed there during working days and returned to his house at Kampung BDC every Sunday; and went back to Kampung Alayan at Batu Putih every Monday. But according to him it would take only half an hour by boat to travel from his house to the place of work at Kampung Alayan, Batu Putih. His son, Julastry (DW4), was his helper and followed the same routine. He maintained that although Monday 26 March 2001 was a public holiday, Awal Muharram, nonetheless, he worked on that day.

[45] The testimony of his son, Julastry bin Paul (DW4), was essentially a repetition of his (Paul's) evidence, except for a single slip when he said that on the night of his father's arrest (Sunday, 8 April 2001) he had just returned from Kampung Alayan, Batu Putih, where he had been constructing a house for one Hj Aras; but later changed the story by saying that he had returned from Batu Putih that evening at 6.30pm but went out fishing at 7pm with his uncle.

[46] The learned trial judge, having considered all the evidence adduced by the defence, was satisfied that the defence had failed to raise a reasonable doubt on the prosecution case.

[47] On the evidence given by Ronny, the learned trial judge said:

> I find the testimony given by the 1st accused relating to the killing of the deceased to be inherently incredible, a version which is concocted by the 1st accused.
>
> The argument of learned counsel for the 1st accused on the murder weapon and the testimony of DW2 that P15 was not sharp coupled with the admission of the 1st accused that he had inflicted an injury on the deceased's neck does not cast a reasonable doubt on the prosecution's case.

[48] We find no reason to interfere with this finding. Ronny, in his defence, had admitted attacking Azman (PW7) with a lethal weapon, only that, instead of a parang, as alleged by the prosecution, he said it was a 'samurai sword'; and he had admitting having caused injuries to the deceased's neck and cheek. Somewhat corroborating the prosecution version of events, he had admitted to having sexually assaulted the deceased; and had admitted having brought Amanra's body to the hut in the banana garden. Ronny's evidence, although it is not an admission of guilt, comes close to being an admission. Be that as it may, whatever that Ronny said in his defence, we, however, agree with the learned trial judge's finding that Ronny's account is nothing but a mere fabrication.

[49] As to the second appellant's defence, the learned trial judge said:

> I have also meticulously considered the alibi of the 2nd accused and find that it has not been established. DW4 is the son of the 2nd accused and his evidence must be evaluated with utmost care. The precise details of the matters relating to the alibi which the

> 2nd accused and his son DW4 echoed in identical terms in their respective testimonies coupled with the fact that it is unsafe to rely on DW4's testimony lead to the inevitable conclusion that the alibi was manufactured. On the totality of the evidence before me I am satisfied that the 2nd accused has not succeeded in casting a reasonable doubt on the prosecution case.

[50] Before us the learned counsel for the defence also submits that the learned trial judge had erred in failing to consider the possibility of a mistaken identity in relation to Norliah's (PW3), Norazmi's (PW6) and Azman's (PW7) evidence identifying Paul as being one of the attackers. It is argued that since the only evidence against Paul was that he merely chased and grabbed Norliah's (PW3) hand and considering that it was already sunset then and therefore visibility could not have been that good, therefore, the defence contention of mistaken identity ought to have been accepted or at the very least being given due consideration by the learned trial judge so as to cast a reasonable doubt on the prosecution case.

[51] This same argument was also raised before the trial judge at the High Court. At the High Court this is how the learned trial judge dealt with the argument:

> The argument of mistaken identity advanced on his behalf is of no consequence. PW3, PW6 and PW7 all saw him in close proximity at the scene of the attack when there was still a little bit of light and he was correctly identified at the identification parade as the other person who attacked them on 26.3.2001. Although the identification parade was conducted 2 days after the 2nd accused had been locked up it was never suggested that he was identified on the basis of the bad smell he acquired as a result of that. The testimony of the 1st accused to the effect that the other person with him on 26.3.2001 was one Taha or Wahid and not the 2nd accused was a manifestation of the 1st accused's desire to protect his brother-in-law.

[52] Based on the totality of the evidence, we are of the view that the learned trial judge was justified in coming to such a finding. On this issue of identity of the second appellant, Paul, the learned trial judge had had the opportunity of seeing the demeanour of all the material witnesses concerned and of assessing their credibility. We, as an appellate tribunal, do not have that benefit. But, having scrutinized the evidence, we do not think that the finding of the learned trial judge is against the weight of the evidence. We find it difficult to accept the evidence of Paul and his son, Julastry (DW4), that they did not come home after

A work during working days considering the time taken by boat to go home after work from Kampung Alayan was only half an hour and that Paul had a wife and had eight other children at home at Kampung BDC. Moreover, Julastri (DW4) contradicted himself when he said that he was working on the day when his father,
B Paul, was arrested. That day, 8 April 2001, was a Sunday and both he and his father Paul had testified that they do not work on Sundays. As such, we think, we ought not to disturb the finding.

C (Note: The panel's decision was on 18 January 2011, and our decision was unanimous. However, by the time this draft judgment was ready on 25 July 2011, a member of the panel, Tengku Baharudin Shah Tengku Mahmud JCA, had retired as a judge of the Court of Appeal. As such he had no opportunity to approve
D this draft.)

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